NAHAR SINGH MITT SINGH

v.

PANG HON CHIN

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 44 OF 1982]
2 JUNE 1983

CONTRACT: *Claim by appellant for return of deposit sum paid to respondent under sale/purchase agreement of house - Breach of agreement by respondent - House sold to third party - Denial by respondent that agreement and deposit receipt were executed by him - Respondent produced passport with endorsements at trial to show his absence from country during relevant time - Whether endorsements admissible without calling their authors - Hearsay.*

CONTRACT: *Fraud - Respondent alleged that an unknown third party had impersonated him and executed agreement - Onus on respondent to prove fraud - Allegation of fraud must be pleaded with particulars and strictly proved - Fraud in the form of a criminal offence when alleged requires higher standard of proof than that required in ordinary matters.*

CIVIL PROCEDURE: *Retrial - Effect - Second opportunity - Staleness of case called for finality.*

This was an appeal against the decision of the learned President of the Sessions Court, Ipoh whereby he dismissed the appellant's claim for the return of a sum or RM6,000 which he claimed he had paid the respondent as a deposit for the purchase of a terrace house at Ipoh for the total sum of RM25,000 under a sale/purchase agreement dated 3 January 1979 (P1) which was prepared by a solicitor PW2. The appellant had alleged that in breach of the agreement the respondent had transferred the house to one Chung Ah King. The respondent by his defence denied both the execution of the agreement and the receipt of the deposit. He contended that he was absent from Malaysia from 17 November 1978 until 22 January 1979 and could not therefore have executed the said agreement at Ipoh on 3 Janaury 1979. He, however, admitted that he had sold the property to Chung Ah King. The appellant had also at the trial led evidence to show that respondent was then sued in another pending case by one Ramasamy (PW3) for the recovery of a sum RM3,000 being money allegedly lent to the respondent on 6 January 1979 and that the defence raised there was identical to that in the instant case, that is to say, that the respondent could not have entered into such a transaction because he was in Thailand at the material time. This evidence the learned President thought was not relevant and rejected it.

The learned Judge's observation regarding the respondent's defence was that on the face of his pleadings, fraud on the part of the appellant may or may not have been implied but it became clear at the trial both from the cross-examination of the appellant and his witnesses and from the submissions of respondent's Counsel that what was alleged was not fraud on the part of the appellant but fraud on the part of an unknown third party who had impersonated the respondent and entered into the said agreement. The issue in the lower Court was: was there or was there not any such impersonation as alleged by the respondent and which of two innocent parties was to suffer by the fraud of a third?

Held:

[1] The learned President had misdirected himself when he found (in effect) fraud on the part of the appellant although this was not even alleged by the respondent. It was, of course, elementary that such an allegation must be pleaded with particulars and strictly proved. What was more, he appeared to have also found (in effect) that the solicitor (PW2) who had prepared the agreement had abetted the appellant's fraud by knowingly attesting the signature of an absent signatory, when this was never put to the solicitor in cross-examination or any submission to that effect made. In the result, the case was decided on the basis of an issue which was not raised in the lower Court and on this ground alone the appeal must be allowed.

[2] If it was proposed to impugn the character or credibility of any witness, whether he was a professional or not, it was essential for opposing Counsel to make this point unmistakably clear during cross-examination of the witness, and, if he does not do so, all things being equal, he should be stopped from making any submission that the credit or character of the witness has been found wanting. The witness should be afforded an opportunity of exculpating himself and to do otherwise would be quite simply a violation of the elementary demands of natural justice.

[3] Once *prima facie* evidence had been adduced by the appellant that it was the respondent who had executed the agreement and received the deposit of RM6,000, and that came not only from the appellant but from the solicitor (PW2) who had prepared it and the broker (PW3), the onus had passed to the respondent to prove fraud in the form of impersonation on the part of an unknown party for it was he who was impeaching the transaction. The respondent had failed to discharge this onus. It is, of course, well settled law that where fraud in the form of a criminal offence was alleged, even in civil proceedings, a higher standard of proof was required than that required in ordinary matters.

[4] The endorsements made on the passport were never proved in one way or another, either by calling their authors, or, alternatively, by calling evidence to pray in aid the provisions of s. 32(b) of the Evidence Act. In the absence of such evidence, the Court was compelled to hold, on the authority of *R. v. Rice* 47 CAR 79, 90 that from an evidentiary point of view the endorsements were plainly hearsay and did not assist the respondents case.

[5] The learned President had also misdirected himself when he wrongfully rejected the evidence led by the appellant as to the pending suit against the respondent which was by one Ramasamy (PW3) for recovery of a sum of RM3,000 being money allegedly lent to the respondent on 6 January 1979 and that the defence raised there was identical to that in the instant case, that is to say that the respondent's absence from the country at the material time. Such evidence was relevant and admissible under the provisions of s. 15 of the Evidence Act to rebut the defence raised.

[6] The Court did not order a retrial because had there been no misreception and wrongful rejection of evidence, the learned President would have entered judgment for the appellant; second, it would enable the respondent who was represented by Counsel of considerable experience in the lower Court, to have a second opportunity of proving his case, and, third, the staleness of the case called for a finality to this unfortunate litigation.

[7] As regards the reliefs to which the appellant was entitled, the Court considered that he should only recover the RM6,000 deposit by way of refund together with interest thereon, at the agreed rate of 12% p.a., from date of service of the summons to date of judgment and thereafter at the agreed rate of 8% p.a. until date of realisation.

[8] The respondent was also ordered to refund to the appellant the deposit paid by way of security for costs of the appeal and costs to him both in the High Court and in the Lower Court.

[Appeal allowed.]

Cases referred to:
Watt v. Thomas [1947] AC 484
Mohd. Dom v. Sakiman [1956] MLJ 45
Toker v. Toker [1863] 3 DJ & S 487
Sim Tiew Bee v. PP [1973] MLJ 200

Legislation referred to:
Evidence Act 1950, ss. 15, 32, (b), 33, 60

Other sources referred to:
Kerr on Fraud & Mistake, 7th Edn., p. 674

For the appellant - S. Theivanthiran; M/s. Thevin Chandran Siva & Chong
For the respondent - S.A. Lingam; M/s. S.A. Lingam & Co.

JUDGMENT

Edgar Joseph Jr J:

At the conclusion of the arguments last Saturday I allowed this appeal and indicated that I would give my reasons later which I hereby do.

In the Sessions Court at Ipoh, the appellant a retired Deputy Superintendent of Police sued the respondent, a businessman, for the return of a sum of RM6,000 which he claimed he had paid the respondent as a deposit under a Sale and Purchase agreement dated 3 January 1979 (the agreement), for the purchase of a terrace house, being No. 43, Jalan Hassan, Lim Garden, Ipoh, Perak (the property), the total purchase price being RM25,000. The appellant alleged that in breach of the agreement the respondent had transferred the property to one Chung Ah King.

By his defence, the respondent denied both the execution of the agreement and the receipt of the deposit. The respondent further contended that he was absent from Malaysia from 17 November 1978 until 22 January 1979 and could not therefore have entered into the transaction concerned with the appellant in Ipoh on 3 January 1979. He, however, admitted that he had sold the property to Mr. Chung Ah King.

I have an observation to make regarding the respondent's defence. On the face of his pleading, fraud on the part of the appellant may or may not have been implied but it became clear at the trial both from the cross-examination of the appellant and his witnesses and from the submissions of Counsel for the respondent that what was alleged was not fraud on the part of the appellant but fraud on the part of an unknown third party who had impersonated the respondent and entered into the transaction concerned with the appellant. In other words, the defence raised the ever recurring question: which of two innocent parties is to suffer by the fraud of a third? The issue in the Court below was thus clear: was there or was there not any such impersonation as alleged by the respondent? Upon this question, once *prima facie* evidence was adduced by the appellant that it was the respondent who executed the agreement and received the deposit of RM6,000 the onus shifted to the respondent to prove his allegation of impersonation. In my view, for reasons which will become apparent later in this judgment, the respondent had failed to discharge this onus.

In my approach to this appeal I have kept in the forefront of my mind on the one hand the principle that the graver the issues involved, and especially where allegations of fraud or criminality are expressed or implied, the greater the duty of the appellate Court to ensure that the conclusions of fact arrived at by the Court of Trial are, for all practical purposes, unimpeachable, and on the other, the following principles enunciated by Lord Thankerton in the celebrated case of *Watt v. Thomas* [1947] AC 484 @ pp. 487 to 488:

> ... I. Where a question of fact has been tried by a Judge without a jury, **and there is no question of misdirection of himself by the Judge**, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion; II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.
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> (Emphasis is mine).

And then Lord Thankerton added, what I consider to be of special relevance to this appeal, namely:

> ... It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question ...

It now becomes necessary to consider the judgment of the learned President, which, I regret to say, I found vulnerable in several respects.

The first error into which the learned President fell was his failure to appreciate the true issue in the case, as a result of which he decided the case on the basis of "the credibility of plaintiff's witnesses as against the silent testimony of documents in particular the defendant's passport D17" (p. 61 para. 2, the last sentence). What, of course, was in issue was not their credibility but the accuracy or their memories and, specifically, whether or not they might have been mistaken as to the identity of the vendor. As a result of misdirecting himself in this way he found (in effect) fraud on the part of the appellant although this was not even alleged by the respondent. It is, of course, elementary that such an allegation must be pleaded with particulars and strictly proved. What was more, he appears to have also found (in effect) that the solicitor (PW2) who prepared the agreement had abetted the appellant's fraud by knowingly attesting the signature of an absent signatory, when this was never put to the solicitor in cross-examination or any submission to that effect made. In this the learned President was clearly wrong. In my view, if it is proposed to impugn the character or credibility of any witness, whether he is a professional or not, it is essential for opposing Counsel to make this point unmistakably clear during cross-examination of the witness, and, if he does not do so, all things being equal, he should be stopped from making any submission that the credit or character of the witness has been found wanting. It seems to me that this must be the proper thing to do, for the witness should be afforded an opportunity of exculpating himself and to do otherwise would be quite simply a violation of the elementary demands of natural justice. In the result, the case was decided on the basis of an issue which was not raised in the Court below and on this ground alone the appeal must be allowed: *Mohd. Dom v. Sakiman* [1956] MLJ 45.

The next error into which the learned President fell and this I consider to be of fundamental importance - concerns the onus of proof. Having regard to the tenor of the defence, as I have already remarked, once *prima facie* evidence of due execution of the agreement by the respondent was adduced, and that came not only from the appellant but from the solicitor who prepared it (PW2) and the broker (PW3), the onus passed to the respondent to prove fraud in the form of impersonations on the part of an unknown third party for it was he who was impeaching the transaction: *Toker v. Toker* [1863] 3 DJ & S 487. It is, of course, well settled law that where fraud in the form of a criminal offence is alleged, even in civil proceedings, a higher standard of proof is required than that required in ordinary matters. In *Bater v. Bater* [1951] p. 35, 37 para. 2 Denning LJ (as he then was) said:

> So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A Civil Court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a Criminal Court, even when it is considering a charge of criminal nature; but still it does require a degree of probability which is commensurate with the occasion.

On this issue all the learned President found was that "Apart from the date of execution of P1 which is questionable, there is also doubt as to whether the signature on P1 is in fact defendant's" (p. 62 para. 1) and went on to hold "On the balance of probability therefore I accept the defendant's story that he was in Thailand and thus could not on 3 January 1979 be in Ipoh to execute P1." (p. 62 end of para. 1). This was placing the onus on the respondent too low. On this further ground also, the appeal must be allowed.

But the matter does not rest there, because there was a clear misreception of certain evidence, relied on heavily by the learned President, which in my view clearly vitiated his decision.

First, there are the endorsements made on the passport, which, if admissible, would certainly afford evidence of the respondent's absence from the country during the relevant time, but, I hasten to add that, even if admissible, they are, of course, always open to rebuttal. It is perfectly possible for a passport to be used by an impersonator and it would be wrong to assume that such endorsements are sacrosanct.

In the instant case, the endorsements were, however, never proved in one way or another, either by calling their authors, or, alternatively, by calling evidence to pray in aid the provisions of s. 32(b) of the **Evidence Act;** *Sim Tiew Bee v. PP* [1973] 2 MLJ 200. In the absence of such evidence, I am compelled to hold, on the authority *of R. v. Rice* 47 CAR 79, 90, that from an evidentiary point of view the endorsements are plainly hearsay and do not assist the respondent's case. Similarly, the contents of the flight schedule (D14), plane ticket butts (D13), and correspondence from the Thai Immigration Authorities (D18), all of which were relied on by the learned President, are open to the same objection.

Second, but less importantly, the learned President also relied on an affidavit affirmed to by Chung Ah King on 9 November 1979 in support of a Notice of Motion to remove a caveat registered against the property at the instance of the appellant, specifically, on para. 3 and 4 which alleged that the relevant document of title had been in the custody of Mr. Chung's solicitors since 25 August 1978 and also that the latter and his family had been in occupation of the property since 3 August 1978. It goes without saying that this affidavit was inadmissible since evidence on such matters at a trial, as opposed to interlocutory proceedings, should be given orally from the witness box (s. 60 **Evidence Act)** unless, of

course, the circumstances warrant the application of s. 32 or s. 33 of the **Evidence Act.** There was, of course, no evidence that Mr. Chung or his solicitor was not available to testify in Court. I might add that although the appellant alleged that he had inspected the property on 2 January 1979, that is to say a day before he signed the agreement, at no time when he was in the witness box was he asked a single question in cross-examination as to whether he had seen Mr. Chung or members of his family during the inspection, and, if so, whether or not he was put on enquiry as to someone else having already bought the property.

There is yet another misdirection and that concerns the wrongful rejection of certain evidence. The appellant led evidence to show that the respondent was being sued in a pending case by one Ramasamy (PW3) for the recovery of a sum of RM3,000 being money allegedly lent to the respondent on 6 January 1979 and that the defence raised there was identical to that in the instant case, that is to say, that the respondent could not have entered into such a transaction because he was in Thailand at the material time. The learned President thought that this evidence was not relevant. With respect, I cannot agree because in my view such evidence was relevant and admissible under the provisions of s. 15 of the **Evidence Act** to rebut the defence raised. As the learned authors of *Kerr on Fraud & Mistake*, 7th Edn. at p. 674 have aptly put it:

> Evidence of similar frauds on the part of the defendant committed on other parties in the same manner are admissible in evidence, if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation. In a vast number of cases such evidence is the only means of establishing fraud ...

It is crystal clear that had the inadmissible evidence aforesaid been excluded, as it undoubtedly should have, and had the admissible evidence of similar facts been relied on as it also undoubtedly should have, the case would have been differently decided. On the one hand, the appellant's evidence was strongly corroborated by the solicitor (PW2) and the broker (PW3) so that the evidence in support of the claim was overwhelming and convincing and more than sufficient to entitle him to judgment. On the other hand, the testimony of the respondent, shorn of the inadmissible evidence aforesaid, was uncorroborated and unsupported and, in effect, amounted to a bare and brazen denial.

I gave careful consideration to the question whether a retrial should be ordered, and indeed, during the argument, I invited Counsel on both sides to address me on this point. I came to the conclusion that I should not do so for three separate reasons: first, because I was confident that had there been no misreception and wrongful rejection of evidence, the learned President would have entered judgment for the appellant; second, to allow a retrial would enable the respondent who was represented by Counsel of considerable experience in the Court below, to have a second opportunity of proving his case; and, third, the staleness of the case called for a finality to this unfortunate litigation.

As regards the reliefs to which the appellant was entitled, I considered he should only recover the RM6,000 deposit by way of refund together with interest thereon, at the agreed rate of 12% p.a., from date of service of the summons to date of judgment and thereafter at the agreed rate of 8% p.a. until date of realisation. I did not think it proper to award damages, although this was asked for, because the evidence on this issue was far too meagre to enable me to make a satisfactory finding in favour of the appellant. I also made orders for refund to the appellant of the deposit paid by way of security for costs of the appeal and costs to him both here and in the Court below.

Also found at [1983] 1 CLJ 310